

**DEPARTMENT OF STATE REVENUE  
LETTER OF FINDINGS NUMBER 98-0594  
SALES AND USE TAX  
For Tax Periods: 1995 Through 1997**

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Issues

1. Sales and Use Tax-Rental of Tangible Personal Property

Authority: IC 6-2.5-2-1 (a), IC 6-2.5-4-10, IC 6-2.5-3-2 (a), IC 6-2.5-3-2 (b), IC 6-2.5-4-10, IC 6-2.5-5-8, IC 6-8.1-5-1 (b), First National Leasing and Financial Corporation v. Indiana Department of State Revenue, 598 N.E.2<sup>nd</sup> 640, (Ind. Tax 1992).

The taxpayer protests the imposition of use tax on an airplane and parts for airplanes.

2. Sales and Use Tax-Advertising

Authority: IC 6-2.5-2-1 (a), Sales Tax Information Bulletin #14.

The taxpayer protests the imposition of tax on certain advertisements.

3. Sales and Use Tax-Property Used in Provision Of A Service

Authority: IC 6-2.5-5-2-1 (a), IC 6-2.5-3-2 (a).

The taxpayer protests the imposition of use tax on property used in the provision of a service.

4. Sales and Use Tax-Rental of Real Estate

Authority: IC 6-2.5-4-4 (a).

The taxpayer protests the imposition of tax on several instances of the rental of real estate.

5. Sales and Use Tax-Sales tax on gasoline

Authority: IC 6-8.1-5-1 (b).

The taxpayer protests the imposition of tax on gasoline.

6. Sales and Use Tax-Miscellaneous Transactions

Authority: IC 6-2.5-2-1 (a), IC 6-8.1-5-1 (b).

The taxpayer protests the imposition of tax on several miscellaneous transactions.

7. Sales and Use Tax-Credit for Sales Taxes Collected

Authority: IC 6-2.5-6-13.

The taxpayer requests a credit for sales taxes collected and remitted to the state.

8. Tax Administration-Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2 (b).

Statement of Facts

The taxpayer is a realty company that provides general realty and other services. After an audit, additional sales and use taxes, penalty and interest were assessed for 1995-1997. The taxpayer protested the assessment and a hearing was held by telephone. More facts will be provided as necessary.

1. Sales and Use Tax-Rental of Tangible Personal Property

Discussion

Pursuant to the provisions of IC 6-2.5-2-1 (a), the Indiana sales tax is imposed on “retail transactions made in Indiana.” IC 6-2.5-4-10 defines the rental of tangible personal property as a retail transaction subject to the sales tax.

Pursuant to IC 6-2.5-3-2 (a), Indiana imposes an excise tax on tangible personal property that was purchased in a retail transaction and “stored, used, or consumed in Indiana . . .” Aircraft purchased in an occasional sale is also subject to the use tax. IC 6-2.5-3-2 (b). IC 6-2.5-4-10 defines the rental of tangible personal property as a retail transaction subject to the sales tax and

use taxes. IC 6-2.5-5-8 exempts from sales and use taxation “tangible personal property ...if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of his business without changing the form of the property.”

Assessments made by the Indiana Department of Revenue are presumed to be correct and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1(b).

On September 30, 2001, the taxpayer purchased a 1967 Cessna airplane without paying the sales tax on the purchase. The auditor assessed use tax on the use of the airplane and repair parts for that and other airplanes because they were tangible personal property purchased in a retail transaction and used in Indiana. The taxpayer contends that the purchase and use of the airplane and repair parts for the airplanes qualified for exemption because they were purchased for the purpose of renting the airplanes to another entity. In support of its contention, the taxpayer submitted copies of leases for the rental of the 1967 Cessna and other aircraft to another business entity.

The submission of leases is not dispositive of the issue of whether or not the aircraft were purchased for rental in the regular course of the taxpayer's business. It is established Indiana law that the substance rather than the form of a transaction determines the tax consequences. First National Leasing and Financial Corporation v. Indiana Department of State Revenue, 598 N.E.2<sup>nd</sup> 640, (Ind. Tax 1992). For rentals to occur, market rate rents must be consistently collected. In this situation, the taxpayer did not consistently collect the rents specified by the leases. Further, the lease contracts state that the lessee is to maintain the aircraft. If the parties had actually followed these terms, the taxpayer would not have had to purchase repair parts for the aircraft. Also, according to the leases, the lessee should have paid the hangar rental. The taxpayer stated that he oftentimes paid the hangar rental for the airplanes. The substance of these transactions clearly indicates that the taxpayer did not actually lease the airplanes to the other entity. Rather, the taxpayer owned the airplanes and allowed the other entity to use them. This use of the 1967 Cessna aircraft and repair parts for the aircraft does not qualify for exemption from the use tax.

### Finding

The taxpayer's protest to the assessment of use tax on the 1967 Cessna airplane and repair parts for the airplanes is denied.

## 2. Sales and Use Tax-Advertising

### Discussion

Sales Tax Information Bulletin #14 clarifies the application of sales and use tax in the advertising situation. Pursuant to this clarification, advertising services are not subject to sales and use taxes. The transfer of tangible personal property, however, is subject to tax.

During the audit period, the taxpayer purchased three types of advertising; ads in a magazine for the sale of airplanes, airplane towing of an advertising banner over a collegiate football game,

and booklets with information on real estate listings for distribution to prospective real estate buyers. The first advertisement was a service that is not subject to the Indiana sales tax. No assessment was in the audit for a tax on the airplane towing of an advertising banner.

The purchase of the real estate booklets is, in actuality, the transfer of tangible personal property in a retail transaction. As such, it is subject to the sales tax. IC 6-2.5-2-1 (a).

#### Finding

The taxpayer's protest to the purchase of advertising in a magazine is sustained. The taxpayer's protest to the tax imposed on advertising booklets is denied.

### 3. Sales and Use Tax-Property Used in Provision of A Service

#### Discussion

Indiana sales tax is imposed on property transferred in a retail transaction in Indiana. IC 6-2.5-2-1 (a). The provision of services is not subject to the Indiana sales tax. The use of tangible personal property in the provision of services is subject to the use tax. IC 6-2.5-3-2(a).

The taxpayer's primary business was the offering of real estate agent services. The taxpayer purchased miscellaneous hardware, mail order merchandise, office equipment and supplies, software and realty signs that it then used in the provision of these services. The taxpayer used these items in the provision of real estate agent services to clients. Therefore the use tax was properly imposed on these items.

#### Finding

The taxpayer's protest to the assessment of use tax on items used in the provision of services is denied.

### 4. Sales and Use Tax-Rental of Real Estate

#### Discussion

During the audit period, the taxpayer rented hotel rooms and meeting rooms for its use, office space to other corporations and airplane hangars to house its airplanes. The sales and use taxability of these transactions is governed by IC 6-2.5-4-4 (a) as follows:

A person is a retail merchant making a retail transaction when the person rents or furnishes rooms, lodgings, or other accommodations, such as booths, display spaces, banquet facilities, and cubicles or spaces used for adult relaxation, massage, modeling, dancing, or other entertainment to another person:

- (1) if those rooms, lodgings, or accommodations are rented or furnished for periods of less than thirty (30) days: and
- (2) if the rooms, lodgings, and accommodations are located in a hotel, motel, inn, tourist camp, tourist cabin, gymnasium, hall, coliseum, or other place, where rooms, lodgings, or accommodations are regularly furnished for consideration.

The rooms that the taxpayer rented for meetings or to house pilots who were flying its planes for an overnight trip clearly fall within the category of rentals of real estate considered subject to the sales and use tax. There was no evidence that any of these rentals of real estate qualified for any of the statutory exemptions from the use tax.

The taxpayer owned real estate and rented rooms in that real estate to other corporations for use as office space. No assessments on these items were found in the audit.

The taxpayer contends that audit reference numbers 2609, 3623, 2664, 2692 and 2711 represent rentals of airplane hangars. The taxpayer does not, however, offer any evidence in support of his contention that these reference numbers represent rentals of airplane hangars. Therefore, the taxpayer does not sustain his burden of proof that these were exempt transactions.

#### Finding

The taxpayer's protest to the use tax on these transactions is denied.

### 5. Sales and Use Tax-Sales Tax on Gasoline

#### Discussion

The taxpayer also protests the imposition of use tax on gasoline that the taxpayer purchased for its airplanes. The taxpayer argues that he paid the sales tax on the gasoline when it was purchased. The taxpayer bears the burden of proving that the assessment is incorrect. IC 6-8.1-5-1(b). The invoices and statements that the taxpayer presented in support of his argument do not have a separate listing for the sales tax. The invoices also do not indicate whether the sale took place through a metered pump that included sales tax in the per gallon price. Rather they have the amount of gallons and total price. These documents do not sustain the taxpayer's burden of proof that he paid the sales tax on the gasoline purchases.

#### Finding

This point of the taxpayer's protest is denied.

### 6. Sales and Use Tax-Miscellaneous Transactions

### Discussion

The taxpayer also protests the imposition of use tax on several miscellaneous transactions. These include payments for pilot services, landing fees, seminars and loan interest payments. The pilot services and seminars qualify as purchases of services rather than sales of tangible personal property. Sales and use taxes are imposed on the transfer of tangible personal property rather than the provision of services. IC 6-2.5-2-1 (a). Therefore no tax is due on these transactions.

The taxpayer did not substantiate the landing fees or loan and interest payments. Without any documentation, the taxpayer is unable to sustain his burden of proving that the assessment is incorrect. IC 6-8.1-5-1 (b).

### Finding

The taxpayer's protest to the tax imposed on the payments for pilot services and seminars is sustained. The taxpayer's protest to the assessment of tax on landing fees and purported loan payments is denied.

## 7. Sales and Use Tax-Credit for Sales Taxes Collected

### Discussion

The taxpayer incorrectly collected and remitted some sales taxes. The taxpayer contends that he should be given a credit against his liability for these taxes. The proper party to claim a refund or credit for sales taxes improperly collected and remitted from the state is the party who actually paid those taxes to the collecting agent or retail merchant. IC 6-2.5-6-13. The taxpayer has no standing to claim a refund or credit for the sales taxes in this situation.

### Finding

The taxpayer's protest is denied.

## 8. Tax Administration-Penalty

### Discussion

Taxpayer's final point of protest concerns the imposition of the ten per cent negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary

reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to reach and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

In this instance, the taxpayer confused his personal and business records and did not keep adequate documentation of his transactions. The taxpayer also failed to pay use tax on clearly taxable items such as office supplies. These breaches of the taxpayer's duty to properly report and remit sales taxes constitute negligence.

### **Finding**

The taxpayer's protest to the imposition of the negligence penalty is denied.